

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS**

RICHARD MILLER,)	
)	
Plaintiff,)	
)	
v.)	CIVIL ACTION
)	No. 01-2333-CM
)	
EBY REALTY GROUP,)	
)	
Defendant.)	
_____)	

MEMORANDUM AND ORDER

Pending before the court is defendant Eby Realty Group's Motion for Judgment as a Matter of Law or in the Alternative for a New Trial (Doc. 48). As set forth below, defendant's motion is denied.

I. Background

Plaintiff Richard Miller, a former employee of defendant, alleged that defendant terminated his employment and retaliated against him on the basis of his age, in violation of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 623(a)(1) & (d). Further, plaintiff claimed defendant unlawfully breached plaintiff's contract of employment. The court granted summary judgment in favor of defendant on plaintiff's retaliation claim, and the remaining claims were tried before a jury. The jury issued a verdict in favor of plaintiff.

II. Motion for Judgment as a Matter of Law or for New Trial

Defendant moves the court for a directed verdict or, in the alternative, for a new trial of this matter, setting forth five separate arguments considered below.

A. Standard

Judgment as a matter of law under Rule 50(b) “should be cautiously and sparingly granted.” *Lucas v. Dover Corp.*, 857 F.2d 1397, 1400 (10th Cir. 1988). The jury’s verdict must be affirmed if, “viewing the record in the light most favorable to [the nonmoving party], there is evidence upon which the jury could properly return a verdict for [the nonmoving party].” *Harolds Stores, Inc. v. Dillard Dep’t Stores, Inc.*, 82 F.3d 1533, 1546 (10th Cir. 1996). A court does not weigh the evidence, pass on the credibility of the witnesses, or substitute its conclusions for those of the jury. *Id.* On the other hand, judgment as a matter of law must be granted if there is no legally sufficient evidentiary basis with respect to a claim or defense under the controlling law. *Id.* at 1546-47 (citing Fed. R. Civ. P. 50(a)). A legally sufficient basis requires more than “a scintilla of evidence” favoring the nonmoving party. *Cooper v. Asplundh Tree Expert Co.*, 836 F.2d 1544, 1547 (10th Cir. 1988).

Motions for a new trial pursuant to Rule 59 are committed to the sound discretion of the trial court. *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 556 (1984); *Hinds v. Gen. Motors Corp.*, 988 F.2d 1039, 1046 (10th Cir. 1993). In reviewing a motion for new trial, the court must view the evidence in the light most favorable to the prevailing party. *Griffin v. Strong*, 983 F.2d 1544, 1546 (10th Cir. 1993). Moreover, the court should “exercise judgment in preference to the automatic reversal for ‘error’ and ignore errors that do not affect the essential fairness of the trial.” *McDonough*, 464 U.S. at 553. “No error in either the admission or the exclusion of evidence and no error in any ruling or order or in anything done or omitted by the trial court or by the parties is ground for granting a new trial or for setting aside a verdict unless the error

or defect affects the substantial rights of the parties.” *Rasmussen Drilling, Inc. v. Kerr-McGee Nuclear Corp.*, 571 F.2d 1144, 1148-49 (10th Cir. 1978); Fed. R. Civ. P. 61. “The party seeking to set aside a jury verdict must demonstrate trial error which constitutes prejudicial error or that the verdict is not based on substantial evidence.” *White v. Conoco, Inc.*, 710 F.2d 1442, 1443 (10th Cir. 1983).

Applying the above standards, the court finds that neither entry of judgment as a matter of law nor an order for a new trial is warranted. Viewing the evidence presented at trial in the light most favorable to plaintiff as the nonmoving party, the court finds defendant has not made a showing that there is no legally sufficient evidentiary basis for the jury’s finding. Furthermore, the court finds that the court made no errors of law necessitating a new trial.

B. Analysis

1. Batson Ruling

a. Background

Defendant argues that the court erred by overruling defendant’s objection to plaintiff’s use of a peremptory strike against an African-American juror, based upon *Batson v. Kentucky*, 476 U.S. 79 (1985). At trial, plaintiff used his peremptory challenges to strike three panel members: Mr. Griffin, a white male; Ms. Owens, an African-American female; and Ms. Riley, an African-American female. Defendant objected contemporaneously to the striking of Ms. Riley. The court held a sidebar with counsel outside the hearing of the jury and, after hearing the arguments of counsel as set forth below, overruled defendant’s objection.

In response to the court’s questions during voir dire, Ms. Riley stated that she had a high school degree and some technical school education. She also stated, in response to a question from defense counsel regarding whether any panel members had experienced a layoff process that they believed was unfair, that she

had experienced a layoff six months prior to the trial but did not personally lose her job. She indicated she believed that some of the layoffs had been unfair.

At the sidebar, counsel for defendant first stated that a prima facie case of racial discrimination existed with regard to Ms. Riley, because she was an African-American who had been struck from the panel. Counsel for plaintiff proffered two race-neutral explanations for striking Ms. Riley. First, he stated that Ms. Riley had only a high school education, which was less than some of the other panel members, and that she may experience difficulty understanding financial issues in the case. Second, counsel for plaintiff stated Ms. Riley “also has experience with a layoff that has occurred, and it seems to me that that might have some influence upon her ability to remain completely fair and impartial, and to abide by the instructions and deliberate based upon the facts in this case.”

Counsel for defendant responded by stating that the reasons proffered by plaintiff were pretextual, because a white woman who had only a high school diploma, Ms. Powell, was not stricken. Further, he stated that although Ms. Riley had answered the question regarding layoffs by stating she thought some of the layoffs had been unfair, she was not one of the individuals laid off.

The court overruled defendant’s objection, finding that defendant had not proven that the race neutral reasons articulated by plaintiff were pretextual.

In the pending motion, defendant reiterates its arguments made at the sidebar, and also raises two new arguments. First, defendant claims that plaintiff’s proffered reasons for striking Ms. Riley were pretextual because Ms. Stark, a white woman whom plaintiff did not strike, had a high school diploma and also indicated she had been through a reduction in force which she believed was unfair. Further, defendant argues that Mr. Hughey, a white male, indicated he had only a high school diploma and some junior college, and had been

through a layoff, but was not stricken from the panel. Defendant also argues that plaintiff's explanation was not worthy of belief because there was no reason to believe that a person with Ms. Riley's level of education would have been unable to understand the financial issues in the case.

b. Analysis

In considering defendant's *Batson* challenge, the court applies the test as articulated by the Supreme Court in *Purkett v. Elem*:

Under our *Batson* jurisprudence, once the opponent of a peremptory challenge has made out a prima facie case of racial discrimination (step one), the burden of production shifts to the proponent of the strike to come forward with a race-neutral explanation (step two). If a race-neutral explanation is tendered, the trial court must then decide (step three) whether the opponent of the strike has proved purposeful racial discrimination. *Hernandez v. New York*, 500 U.S. 352, 358-359, (1991) (plurality opinion); *id.*, at 375 (O'Connor, J., concurring in judgment); *Batson, supra*, at 96-98. The second step of this process does not demand an explanation that is persuasive, or even plausible. "At this [second] step of the inquiry, the issue is the facial validity of the prosecutor's explanation. Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral." *Hernandez*, 500 U.S., at 360 (plurality opinion); *id.*, at 374 (O'Connor, J., concurring in judgment).

514 U.S. 765, 767 (1995). The trial court must then decide whether the party raising the *Batson* claim has proven purposeful discrimination. *Id.* at 767-68. Moreover, the party bringing the *Batson* challenge always carries the ultimate burden of persuasion. *Id.* at 768.

As the Tenth Circuit explained, "[a]n explanation for the strike is race-neutral so long as the reason is related to the case and 'does not deny equal protection.'" *Heno v. Sprint/United Mgt. Co.*, 208 F.3d 847 (10th Cir. 2000) (citing *Purkett*, 514 U.S. at 768); *see also Hidalgo v. Fagen, Inc.*, 206 F.3d 1013, 1019 (10th Cir. 2000) ("A neutral explanation means an explanation based on something besides the race of the

juror. . . . Unless discriminatory intent is inherent in the justification, the reason offered will be deemed race neutral”). The court finds that it did not err in determining that the reasons proffered by plaintiff were race neutral.

Regarding whether defendant made an adequate showing of pretext, the court notes that the Tenth Circuit has found, in dicta, that pretext may be shown by comparing shared characteristics of a struck juror and an empaneled nonminority juror. *Johnson v. Gibson*, 169 F.3d 1239, 1248 (10th Cir. 1999) (citing *Turner v. Marshall*, 121 F.3d 1248, 1251-52 (9th Cir. 1997)). Further, regarding whether the moving party has made an adequate showing of pretext, the Supreme Court recently noted: “In the typical peremptory challenge inquiry, the decisive question will be whether counsel’s race-neutral explanation for a peremptory challenge should be believed. There will seldom be much evidence bearing on that issue, and the best evidence often will be the demeanor of the attorney who exercises the challenge.” *Miller-El v. Cockrell*, 123 S. Ct. 1029, 1041 (2003). “Credibility can be measured by, among other factors, the prosecutor’s demeanor; by how reasonable, or how improbable, the explanations are; and by whether the proffered rationale has some basis in accepted trial strategy.” *Id.* at 1040.

At trial, the court evaluated the credibility of the explanations provided by plaintiff’s counsel, as well as defendant’s attempts to prove pretext. The court determined defendant failed to show pretext based upon the failure of plaintiff to strike Ms. Powell and the meaning of Ms. Riley’s response in regard to the question whether she had experienced a layoff.

Upon reconsideration, the court finds that its decision was not in error. Even though Ms. Riley stated she herself did not lose her job, she indicated unequivocally that she believed some of the layoffs had been unfair. In this case, a reduction in force was a proffered legitimate nondiscriminatory reason for defendant’s

termination of plaintiff's employment. The court recognizes that counsel may have had a legitimate interest in striking a juror who indicated she had worked in an environment in which layoffs had occurred which were, in her opinion, unfair. At any rate, it is a racially neutral reason which the court found had not been shown to be pretextual. Further, while defendant did argue to the court that Ms. Powell had a similar level of education to Ms. Riley, defendant did not argue that Ms. Powell had expressed a similar opinion regarding a reduction in force. Accordingly, the court was correct in not applying the rationale that plaintiff's failure to strike Ms. Powell demonstrated that plaintiff's proffered reasons were pretextual.

Moreover, defendant did not raise the arguments regarding Ms. Stark and Mr. Hughey at trial. Because the court was in no position to raise such arguments sua sponte, and because the court could not evaluate the credibility of counsel in making such arguments, the court denies defendant's motion to the extent it is premised upon a comparison with Ms. Stark and Mr. Hughey. Even if the court were to evaluate the merits of defendant's argument, the court finds that defendant has failed to set forth a sufficient basis to show that these individuals were similarly situated to Ms. Riley but for their race. Here, the court finds that it did not err by finding defendant had failed to make an adequate showing that plaintiff's proffered reasons for striking Ms. Riley were pretextual.

2. Summary Judgment

Defendant renews its motion for summary judgment. The court incorporates by reference its analysis of such arguments as contained in its prior orders. Defendant's renewed motion is denied.

3. Sufficiency of the Evidence

Defendant claims the evidence presented to the jury was insufficient to sustain the verdict. Specifically, defendant argues that there was no evidence of discriminatory intent presented at trial. In *Townsend v.*

Lumbermens Mutual Casualty Co. d/b/a Kemper National Insurance Co., 294 F.3d 1232 (10th Cir. 2002), the Tenth Circuit held that a district court hearing an employment discrimination suit must instruct jurors that if they disbelieve the employer's proffered explanation for the adverse employment action they may, but need not, infer that the explanation was a pretext for discrimination. However, the Tenth Circuit specified in *Townsend* that the pretext instruction is required only where "a rational finder of fact could reasonably find the defendant's explanation false and could 'infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose.'" *Id.* (quoting *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 134 (2000)). The court gave precisely such an instruction: "You may find that plaintiff's age was a determinative factor in defendant's decision to discharge plaintiff if it has been proven by a preponderance of the evidence that defendant's stated reason for its decision is not the true reason, but is a 'pretext' to hide discriminatory motivation." (Instruction no. 14). Accordingly, the court need not evaluate whether evidence of discriminatory intent was presented at trial. In accordance with Tenth Circuit law, the jury was free to infer such intent from a disbelief of the reasons provided by defendant for its termination of plaintiff's employment. The court declines to grant defendant's objection on this basis.

4. Evidentiary Rulings

Next, defendant states the court erred by excluding (1) defendant's Exhibit 404 (September 1999 Diary Entry), and (2) the explanations provided by defendant to the Equal Employment Opportunity Commission (EEOC) for its decision to terminate plaintiff.

a. Exhibit 404

Defendant argues that the court erred by sustaining plaintiff's objection to the admission of Exhibit 404, a September 30, 1999 calendar notation made by Mike Eby, an officer of defendant, regarding the "switching"

of plaintiff with Alan Fairbanks, the individual who became plaintiff's replacement. The court excluded Exhibit 404 on the grounds that it concerned plaintiff's performance as general manager, and that the court had already ruled in limine that such evidence must be excluded.

In the limine conference, the court granted plaintiff's motion in limine to exclude evidence of plaintiff's performance as general manager of EMC, Inc., on the grounds that such evidence was not relevant, given that the parties had stipulated in the Pretrial Order that plaintiff's performance did not play a role in defendant's decision to terminate him. Defendant states that, at trial, plaintiff testified that he had learned after the lawsuit was filed that defendant had been thinking of switching plaintiff with Alan Fairbanks. Defendant then moved to admit defendant's Exhibit 404, which defendant stated was a page from Mike Eby's calendar. Exhibit 404 contained in part the statement, "We are thinking about switching Alan and Richard," as well as statements regarding plaintiff's performance as general manager, such as, "we are also concerned about Richard's performance and think Alan shares our . . . philosophy and Richard does not." Defendant states that it attempted to redact statements related to plaintiff's performance, and that the court refused to admit the redacted version. Further, defendant argues the jury was unable to place plaintiff's statements regarding switching into a proper context due to the exclusion of the calendar page.

The court finds that its exclusion of Exhibit 404 was not erroneous. The court's conclusion that the redacted version of the calendar concerned plaintiff's performance as general manager and was therefore properly excluded was proper in light of the court's motion in limine ruling. Furthermore, even if the court erred, there is no basis to conclude that any alleged error affected the substantial rights of the parties. Defendant has identified nothing in the redacted exhibit that could have influenced the jury to determine the issues in the case differently.

b. EEOC Letter

Next, defendant contends the court erred by refusing to admit the position statement defendant submitted to the EEOC. According to defendant, the statement specified that plaintiff was laid off due to a reduction in force, and that plaintiff did not share the owner's vision for the company. The court excluded this evidence on the basis that it violated the stipulation entered into by the parties. As reflected in the jury instructions, the parties stipulated that "when Mr. Eby terminated plaintiff's employment, Mr. Eby stated that the **sole reason** for his doing so was due to a reduction in force." (emphasis added). The parties also stipulated that, "[i]n terminating plaintiff's employment, no consideration of any kind was given to plaintiff's past performance as general manager."

The court finds that the court's ruling was proper in light of the parties' stipulation. Moreover, plaintiff did not "open the door" to the admission of such a statement. Finally, even if this ruling was erroneous, the court finds that the ruling did not affect the substantial rights of the parties.

5. Instruction no. 15

Defendant claims the court erred by submitting Instruction no. 15 to the jury. Instruction no. 15 read, "If you disbelieve defendant's proffered explanation for the termination, you may – but need not – infer that defendant's true motive was discriminatory." Defendant argues this was an inaccurate statement of the law because it did not require the jury to find intentional discrimination based upon age.

In *Reeves*, the Court affirmed that "[t]he ultimate question in every disparate treatment case is whether the plaintiff was the victim of intentional discrimination." 530 U.S. at 135. "In appropriate circumstances, the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover

up a discriminatory purpose. Such an inference is consistent with the general principle of evidence law that the factfinder is entitled to consider a party's dishonesty about a material fact as 'affirmative evidence of guilt.'" *Id.* at 147 (citations omitted). Thus, "a plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated." *Id.* at 148. However, the Court also noted that, "[t]his is not to say that such a showing by the plaintiff will always be adequate to sustain a jury's finding of liability." *Id.* (citation omitted).

Furthermore, as the court discussed earlier in this opinion, the Tenth Circuit stated in *Townsend* that a pretext instruction such as the one given "is required where, as here, a rational finder of fact could reasonably find the defendant's explanation false and could 'infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose.'" 294 F.3d at 1241 (citing *Reeves*, 530 U.S. at 134).

The court believes that the instruction given was consistent with the direction provided by the Supreme Court and Tenth Circuit regarding methods by which a jury may infer intentional discrimination in employment cases. The instruction merely informed the jury that it *may* infer that defendant acted with discriminatory intent, in the event the jury believed that defendant's proffered explanation was not credible. It did not *require* the jury to make such a finding. Moreover, the instruction did not obviate the requirement that the jury must find that defendant acted with discriminatory intent. The necessity that the jury must find discriminatory intent in order to award relief to plaintiff was stated in Instruction no. 13: "[i]n order for plaintiff to establish his claim, he must prove by a preponderance of the evidence that defendant intentionally discriminated against plaintiff because of plaintiff's age." Instruction no. 15 set forth a proper circumstance upon which the jury could make such a finding of discriminatory intent. Defendant's objection is overruled.

III. Order

IT IS THEREFORE ORDERED that defendant Eby Realty Group's Motion for Judgment as a Matter of Law or in the Alternative for a New Trial (Doc. 48) is denied.

Dated this 20th day of August 2003, at Kansas City, Kansas.

s/CARLOS MURGUIA
CARLOS MURGUIA
United States District Judge